# No. 10,068

IN THE

# United States Circuit Court of Appeals

**For the Ninth Circuit**

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GEORGE M. STOUT, State Liquor Administrator of the State of California, and LUTHER M. SAY, Chief Liquor Control Officer of District D of the State Board of Equalization of the State of California,

*Appellants,*

vs.

BERT M. GREEN, Trustee of the Estate of George Hugo Malter, Bankrupt,

*Appellee.*

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## BRIEF FOR APPELLEE.

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## BRIEF FOR APPELLEE.

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### I.

### STATEMENT AS TO JURISDICTION.

This is an appeal from an order of the District Court of the United States for the Southern District of California, Northern Division, affirming, as amended by the Judge of the District Court, an order of the Referee in Bankruptcy for the Southern District of California, Northern Division, residing at Fresno, California, enjoining certain officers of the California

State Board of Equalization from enforcing the provisions of the Alcoholic Beverage Control Act against Appellee herein. (Tr. pp. 88-89.)

District Courts of the United States and their referees in bankruptcy have general jurisdiction over matters in bankruptcy. (Section 2 of the Bankruptcy Laws of the United States as amended by Act of June 22, 1938; Section 11, Title 11, *U. S. C. A.*)

District Courts of the United States have original jurisdiction over appeals from orders of referees in bankruptcy. (Section 39c, Bankruptcy Laws of the United States as amended by Act of June 22, 1938; Section 67, Subdivision c thereof, Title 11 *U. S. C. A.*)

Circuit Courts of Appeals have jurisdiction over appeals in bankruptcy matters from District Courts of the United States. (Section 24 of the Bankruptcy Laws of the United States as amended by Act of June 22, 1938; Section 47, Title 11, *U. S. C. A.*)

Appellee's petition for a restraining order and order to show cause initiated this proceeding and the subsequent order from which this appeal is taken, was based upon said petition and Appellants' answer thereto. (See Tr. pp. 2 to 6 for the said Petition for a Restraining Order and Order to Show Cause. See Tr. pp. 71 to 75 for Appellants' Answer thereto.)

## II.

### STATEMENT OF THE CASE.

On August 12, 1939, George Hugo Malter filed a debtor's petition under the provisions of Chapter XI of the Bankruptcy Laws of the United States (Tr. pp. 68, 32), and was declared a bankrupt upon November 18, 1939, at which time Bert M. Green, Appellee herein, was appointed trustee for the said bankrupt estate. (Tr. p. 69.)

Among the assets of the bankrupt was a dismantled still (Tr. pp. 69, 32), which had been owned and possessed by the bankrupt, pursuant to a license issued by the State of California under the provisions of the California Alcoholic Beverage Control Act. The annual license fee for possessing said still was $10.00. The bankrupt had not paid his renewal license fee of $10.00 to the State of California when the same had become due on June 30, 1939, just prior to his bankruptcy. (Tr. pp. 68, 32.) The said trustee in bankruptcy, *Appellee herein, never operated the business of the bankrupt, never had permission from the Court so to do, and did not operate the said still in question at any time during his administration;* said Trustee at all times was acting only as liquidating officer of the Court, and was only engaged in the sale of the bankrupt's assets for the benefit of creditors. (Tr. pp. 69, 44 and 45, 32.) This point is determinative of many of the issues herein and should be most carefully considered.

Upon Appellee herein taking office the Appellants herein demanded that Appellee pay a $10.00 license

fee for his possession of the said still. (Tr. p. 70.) Appellee refused to pay said license fee, first, because he was advised that the law did not require this payment, and, secondly, because he had no funds for the payment of administration expenses in this bankrupt estate. In fact Appellee had no money whatsoever on hand. (Tr. pp. 32, 35.) Thereupon, after threats made by Appellants to seize the said still and prosecute the said trustee, the trustee procured an injunction from the referee in bankruptcy, which was later affirmed as amended by the district judge, restraining and enjoining Appellants from taking any steps to enforce the Alcoholic Beverage Control Act against the said Trustee, and the bankrupt estate excepting the presentation of claims in the bankrupt estate for the payment of said license fee. (Tr. pp. 88 and 89.)

The trustee after fees came into his hands did apply for a still license and tender the license fee, although he was still of the opinion that the law did not require him so to do. This application was made so as to avoid extensive litigation over a matter involving such a small amount of money. (Tr. pp. 36 and 37.) The State Board of Equalization of the State of California has failed to act on Appellee's application for a still license. (Tr. p. 36.)

After the referee made his order of restraint, Appellants took a writ of review to the District Court and the referee's injunction was affirmed in the District Court as modified therein. (Tr. pp. 88 and 89.) This order of the District Court was entered on November 22, 1941. From the order of the District Court Appellants have prosecuted this appeal.

## III.

### QUESTIONS PRESENTED ON APPEAL.

(1) Is a trustee in bankruptcy required to comply with the provisions of the Alcoholic Beverage Control Act of the State of California, concerning the licensing of a still taken into his possession as an asset of a bankrupt estate?

(2) Assuming, but not admitting, that the trustee is subject to said licensing provisions, at what period in the administration of said estate is he required to pay the license fee called for in the said statute?

(3) Is the still in question forfeited to the State of California (a) either by reason of delinquency in payment of tax by the bankrupt; (b) or by reason of delinquency in payment of taxes by the trustee?

(4) Must the United States by reason of its claim of lien upon the still in question be a party to any proceeding in the Bankruptcy Court looking to the forfeiture of its still to the State of California?

(5) Has a referee in bankruptcy power to determine the validity and effect of taxes claimed by the State from a trustee in bankruptcy under the provisions of the California Alcoholic Beverage Control Act, and the power to protect a trustee in bankruptcy and the bankrupt estate by an injunction directed against the State officers charged with enforcing the provisions of the Alcoholic Beverage Control Act?

## IV.

## ARGUMENT OF THE CASE.

### A.

### APPELLEES' ARGUMENT.

#### (1) A TRUSTEE IN BANKRUPTCY NOT OPERATING A BUSINESS, IS NOT SUBJECT TO THE LICENSING PROVISIONS OF THE CALIFORNIA ALCOHOLIC BEVERAGE CONTROL ACT.

It is elementary that some statute must exist, either State or Federal, that would require a trustee in bankruptcy to pay the tax leived by the Alcoholic Beverage Control Act upon the possessor of a still. Failing such statutory requirement the trustee, of course, would not fall within the provisions of the Alcoholic Beverage Control Act in the exercise of his duties as a liquidating officer of the Bankruptcy Court.

The Alcoholic Beverage Control Act of the State of California (Statutes 1935, p. 1123, as amended by Statutes 1937, pp. 1934 and 2126; Deering's General Laws, Act 3796) requires each person possessing a still to pay a $10.00 tax yearly for the possession of such still. The said Act in Section 2, subdivision F thereof, describes a person as follows:

> "'Person' includes any individual, firm, copartnership, joint adventure, association, corporation, estate, trust, business trust, receiver, syndicate or any other group or combination acting as a unit, and the plural as well as the singular number."

It will be noted that a trustee in bankruptcy is not specifically mentioned in the definition of "person".

A trustee in bankruptcy being an officer of the Court, and, therefore, identical with the sovereign power of the United States, the rule is that he is not included within the contemplation of the statute unless the statute specifically refers to a trustee in bankruptcy. In this connection I quote from *Associated Brewer Distributing Co. v. Riley,* 39 Cal. App. (2d) 235, at page 238, 102 Pac. Rep. (2d) 781:

> "The established rule is, however, that a sovereign power, in this case the Federal Government, shall not be deemed to be included within the general language of a statute—that unless special words are used indicating a contrary intent, it must be presumed that the statute was not designed to operate against the Government."

In the case now before the Court the trustee in bankruptcy is part of the sovereignty of the United States, being an officer of the United States. The trustee's possession of the still was the court's possession. Therefore, this still was in the possession of the sovereignty. *In re California Pea Products, Inc.,* 37 F. Supp. 658, at page 661, holds as follows:

> "The possession of the property by the trustee is the court's possession and any act interfering with the court's power of control and disposal and done without the court's sanction is void. Dayton v. Stanard, 241 U. S. 588, 36 S. Ct. 695, 60 L. Ed. 1190."

See also *Gagne, Collector of Internal Revenue v. Brush; In re Cullen Hardware Corporation,* 30 F. Supp. 714, at page 716, which holds:

"I hold that a trustee in bankruptcy is an instrumentality of the United States * * *"

*Isaacs v. Hobbs Tie & Timber Co.,* 282 U. S. 734, 51 Sup. Ct. 270;

*In re Tyler,* 149 U. S. 164, 13 Sup. Ct. 785.

There being nothing expressly within the State statute requiring a trustee in bankruptcy to pay the still license tax, we then turn to the Federal statutes in an endeavor to ascertain whether or not there is anything in said statutes requiring a trustee in bankruptcy to pay such tax. The Appellants have cited Sections 124 and 124a of Title 28, *U. S. C. A.,* as their authority that this trustee was required to pay this tax.

*U. S. C. A.,* Section 124, Title 28.

"Management of property by receivers. Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall wilfully violate any provision of this section shall be fined not more than $3,000, or imprisoned not more than one year, or both."

*U. S. C. A.,* Section 124a, Title 28.

"State taxation; business conducted by receivers, trustees, or other court officers subject to.

Any receiver, liquidator, referee, trustee, or other officers or agents appointed by any United

States court who is authorized by said court to conduct any business, or who does conduct any business, shall, from and after June 18, 1934, be subject to all State and local taxes applicable to such business the same as if such business were conducted by an individual or corporation: Provided, however, that nothing in this section contained shall be construed to prohibit or prejudice the collection of any such taxes which accrued prior to June 18, 1934, in the event that the United States court having final jurisdiction of the subject matter under existing law should adjudge and decide that the imposition of such taxes was a valid exercise of the taxing power by the State or States, or by the civil subdivisions of the State or States imposing the same."

These sections apply only to trustees or receivers who are operating a business. There is no dispute of the fact that this trustee was not operating either the still or any business.

Therefore, under the authority of *In re California Pea Products, Inc.* (supra), it is clear that the Federal statutes do not require a trustee to pay this tax. I quote from page 661 of said case:

"The record shows that the trustee was not authorized by the bankruptcy court to conduct business under the permissive provisions of the bankruptcy act. Section 2, sub. a (5), 11 U.S.C.A. Section 11, sub. a (5) in fact, no application of any kind was made to carry on or to conduct business. On the contrary, all of the selling activities of the trustee in bankruptcy were purely liquidating functions and in no proper sense should be considered in any other category. This factual

> difference distinguishes such cases as City of Springfield v. Hotel Charles, 1 Cir., 84 F. 2d 589, and In re: Chas. Nelson Co., D.C., 27 F. Supp. 673. It also illustrates the inapplicability of Section 124a of Title 28, U.S.C.A. to the transactions of the trustee in bankruptcy under consideration."

Under the above authorities it is respectfully contended that a trustee in bankruptcy is not subject to the payment of this tax during the administration of the estate.

### (2) THE TAX OWING TO THE STATE OF CALIFORNIA, IF ANY, IS NOT YET DUE OR PAYABLE.

Assuming for the purposes of argument that the trustee is required to pay this tax the question then arises as to when the tax becomes due. Counsel for the State contends that immediately upon the acquisition of the still the license fee became due and the trustee was thereupon required to pay the same, and failing to do so the still became forfeited to the State. It is elementary that the still would not forfeit until such time as the license tax became due and payable and was not paid. If, therefore, the tax did not become payable until such time as the trustee rendered his account of his administration and was authorized to pay this tax by the referee, then the still would not forfeit until such time as this order was made and the trustee refused to comply with it. If the State wished an earlier payment of the tax it was their duty to file a claim or demand therefor, or start a proper proceeding in the Bankruptcy Court to procure an order of the referee ordering and authorizing the trustee to pay this tax.

It is conceded by all concerned that the tax on the trustee's possession of said still would have been an administrative expense only. It is further conceded that at the time that the first request for payment was made there were no funds in the hands of the trustee for the payment of the same. As a matter of fact there has never been any determination by the trustee or by any court proceedings that there would be at any time sufficient funds to pay all expenses of administration in full. The Bankruptcy Act (supra), Section 64 thereof establishes the priority of payment of claims and demands upon a bankrupt estate, and subdivision 1 of subdivision (a) thereof establishes as first priority the expenses of administration.

Subdivision 1 of subdivision (a) of Section 64 of the Bankruptcy Laws of the United States, as amended by Act of June 22, 1938, lists the following as having first priority in payment:

> "The actual and necessary costs and expenses of preserving the estate subsequent to filing the petition; the filing fees paid by creditors in involuntary cases; where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the cost and expense of one or more creditors, the reasonable costs and expenses of such recovery; the costs and expenses of administration, including the trustee's expenses in opposing the bankrupt's discharge, the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional

> services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases and to the bankrupt in voluntary and involuntary cases, as the court may allow."
>
> *U. S. C. A.*, Section 104, Title 11.

All expenses of administration are on a par one with the other, and there is no suborder of priority established by said subdivision 1. In the event the trustee pays any expenses of administration prior to the payment of all expenses of administration the trustee runs the risk of being surcharged in the event, at the close of the estate, he does not have sufficient funds to pay all expenses of administration in full. Therefore, it is only reasonable that he would not be required to pay this expense of administration, or any other until such time as an adjudication of the referee determined that there were sufficient moneys on hand to pay all expenses of administration. It follows in this case that he could not have been required to pay this tax at the time that there were no funds on hand, and since the tax was not due at the time demand was made no forfeiture could ever have taken place. Two cases in which a trustee was surcharged for paying some expenses of administration in full prior to the payment of other expenses of administration are *In re Lambertville Rubber Co.*, 111 Fed. (2d) 45, and *In re Englander*, 39 Fed. (2d) 931. In *In re Lambertville Rubber Co.* (supra) the trustee had paid certain taxes in full, and upon his final accounting found that he did not have sufficient funds to pay the expenses of ad-

ministration in full. At page 50 of said case the Court held as follows:

> "We conclude that the trustee acted negligently in paying the taxes referred to in this opinion. He must therefore be surcharged."

I further quote from page 48 of said case as follows:

> "The trustee is charged with an intimate knowledge of the estate which he is administering and if he pays claims out of time and without the protection of an order of the court affirmatively authorizing such conduct, he must be certain that such payments will work no harm to any creditor. Under such circumstances he acts at his own risk and if his judgment is bad, he must accept the consequences."

The trustee in this particular case knew that there were no funds on hand and that the assets of the debtor were encumbered with a great many liens. Therefore, it was not at all probable that there would be sufficient moneys to pay all expenses of administration. The trustee's judgment, therefore, did not permit him to pay this tax until some funds were received, and it is inescapable therefore that the tax was not due until such time as the trustee's judgment told him that there would be sufficient moneys to pay the taxes and the Court so ordered. I quote from *In re Englander* (supra), from page 932 of said case as follows:

> "The receiver received the bankrupt estate as a trust fund, and it would be inequitable if he could prefer one or more creditors of the administration over others of equal rank and pay them in full to the detriment of the others. * * * It is therefore

> necessary to make a pro rata application of the gross amount of the estate to all the expenses of the receivership, although this may result in the receiver being the loser of whatever he has paid any of his administration creditors in excess of what they have received in a pro rata distribution."

It is conceded by Appellants that this expense of administration is a tax. I refer the Court to page 15 of the brief filed herein by Appellants, and for the cases cited therein on the proposition that this exaction is a tax. *In re Mid America Co.,* 31 Fed. Supp. 601, recites as follows:

> "The word 'tax' as used in Section 64, subdivision (a) (4) quoted above is not to be construed in a limited sense, but must be interpreted to include all types of involuntary exactions, regardless of name, levied by the Federal and State Governments for governmental or public purposes."

The Bankruptcy Court has exclusive jurisdiction to determine the validity, priority in payment, and the time of payment of taxes claimed against bankrupt estates and trustees in bankruptcy. Subdivision 4 of subdivision (a) of Section 64 of the Bankruptcy Act (supra), reads as follows:

> "Taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof: Provided, That no order shall be made for the payment of a tax assessed against any property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court: And provided further, That, in case any question arises as to the amount

> or legality of any taxes, such question shall be heard and determined by the court."

In view of the above it is respectfully submitted that no forfeiture has taken place in view of the fact that this expense of administration is not due, first, until the Bankruptcy Court has determined that this claim is a valid charge against the bankrupt estate, and second, until some action has been taken to determine that there is sufficient money to pay all expenses of administration, and the trustee is authorized to pay this tax together with other expenses of administration.

(3) THE STILL WAS NOT FORFEITED TO THE STATE AT THE TIME THE TRUSTEE TOOK POSSESSION OF THE SAME, NOR THEREAFTER.

Appellants, after once demanding that Appellee procure a still license for the still in question, now contend that the said still was contraband and forfeited to the State of California at the time they proposed to license the same Appellee. The lack of *bona fides* of Appellants in this untimely contention should be apparent to the Court.

It must be conceded that statutes providing for forfeiture must be strictly construed against the party asking for forfeiture. See 12 *California Jurisprudence,* at page 633, being Section 3 on Forfeiture.

> "Forfeitures are never favored by courts of law or equity, and are never enforced if they are couched in ambiguous terms."

See also cases cited in said section as to the strict construction to be placed on forfeiture statutes.

The statute under which the forfeiture is claimed is Section 4 of the Alcoholic Beverage Control Act (supra), the last portion of which, dealing with forfeiture, reads as follows:

> "The board may seize and summarily destroy any still which is not registered or for which a license has not been obtained as required by this act."

It is conceded that this still was registered by the bankrupt and it is further conceded that a license had been obtained by the bankrupt for this still, the only point that the Appellants make being that although the still had been registered and a license had been obtained, the renewal fee for said yearly licensing had not been paid.

Section 8 of the Alcoholic Beverage Control Act (supra) covers the penalties prescribed for failing to renew licenses which have become delinquent. I quote from the last paragraph of said section, which establishes the said penalty for failing to renew licenses:

> "For failure to reapply for a license prior to the time when any license expires, the board may by regulation prescribe that in addition to the license fees specified in section 5 hereof a penalty of not to exceed twenty-five per cent of such fees must be paid."

Section 5 of the Alcoholic Beverage Control Act (supra), subdivision 5 thereof, requires the payment of $10.00 per year for a still license.

Therefore, it would seem under the strict construction of the above Act that since the still in question

had been licensed by the bankrupt, and the bankrupt was only delinquent in the payment of the yearly license fee, that the only penalty which could be enforced against said bankrupt, or his successor in interest, the trustee, would be the collection of a twenty-five per cent penalty for the failing to pay said tax. In a bankruptcy proceeding in order to collect this tax the State would have had to file a claim in the proceedings for the payment of this tax and the penalty prescribed by the statute would not be collectible in the bankruptcy proceedings. No claim has been filed by the State and the time for filing claims has expired.

The Appellants contend that the still was forfeited at the time the trustee took possession because of the non-payment of this debt to the State by the bankrupt. They claim that the penalty for this non-payment was the forfeiture of the still. The Bankruptcy Laws of the United States (supra) prohibit said forfeiture. I quote from Section 57J of the Bankruptcy Act (Section 93J, Title 11, *U. S. C. A.*):

> "Debts owing to the United States or any State or subdivision thereof as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law."

This section applies to many penalties which are placed upon individuals for late payment of taxes. In

the instant case, however, the penalty is a forfeiture and as such is prohibited by the above section.

Appellants have claimed that the trustee took no title to this still by virtue of the fact that it was forfeited and was, therefore, contraband, and not property at the time the trustee took possession of the assets of the bankrupt. Even though, the State had the right to enforce the forfeiture at the time the trustee took possession, the State's rights were not perfected, and the bankrupt still had the title to the still and that title did pass to the trustee. I quote from *People v. Broad,* 216 Cal. 1, 12 Pac. Rep. (2d) 941:

> "Even where, as here, the Statute declares that a forfeiture takes place at the time of the commission of the offense, such forfeiture is not fully and completely operative and effective, and the title of the State is not perfected until there has been a judicial determination."

The above case is one in which the State was endeavoring to forfeit an automobile which had been used for the transportation of narcotics. See also *Leman v. L. A. T. Ry. Co.,* 38 Cal. App. (2d) 659, at page 673, 102 Pac. Rep. (2d) 387.

Therefore, it would appear that the trustee did take title to the property, and since he did take title under Section 57J of the Bankruptcy Act (supra) no forfeiture could then be effective as to the trustee.

### (4) CONFLICTING CLAIMS TO THIS STILL MAY ONLY BE DETERMINED IN THE BANKRUPTCY COURT.

The evidence and the records in the bankruptcy proceedings disclose that the United States of

America claims a lien upon the still in question. Therefore, were the trustee to permit the State to take the still in question without an adjudication as to the rights of the United States the trustee might be subject to make payment of the claim of the United States out of other funds. The law requires all conflicting claims, or interests in property in a bankruptcy to be determined in the Bankruptcy Courts and the Bankruptcy Court may not divorce itself of the jurisdiction so to do. This is true, of course, only where possession of the property has come into the Bankruptcy Court. In this case the trustee has had possession of the still at all times as shown in the Referee's certificate. See *Remington on Bankruptcy,* Section 2472, which reads as follows:

> "Liens upon property in the custody of the bankruptcy court, and interests in such property, may be marshaled and their validity and priority determined by the bankruptcy court, in the bankruptcy proceedings."

See also *Remington on Bankruptcy,* Section 2804, governing the determination of tax questions relating to bankruptcy property, which reads as follows:

> "But the Bankruptcy Court is the forum for the determination of the amount and legality of the tax and all questions in relation thereto."

See also *Remington on Bankruptcy,* Section 2478, regarding the Referee's jurisdiction to marshal liens against the property of the bankrupt. In that connection see *In re Rochford,* 124 Fed. 182, which reads as follows:

> "A referee in bankruptcy has jurisdiction to draw to himself by summary process or notice, and in the first instance to determine the question of the validity of the claim of a third party to a lien upon it, or an interest in, property or the proceeds of property lawfully in the custody of a trustee in bankruptcy."

See:

*In re Florence Commercial Co.,* 19 Fed. (2d) 468;

*Mound Mines Co. v. Hawthorne,* 173 Fed. 882.

*Mound Mines Co. v. Hawthorne,* 173 Fed. 882, at page 885, holds that the Referee may require all third party claims to property to be tried in the Bankruptcy Court, when the trustee in bankruptcy has the possession of the same.

It seems obvious from the above citations that all conflicting claims to property in the possession of a trustee in bankruptcy must be brought before the Bankruptcy Court. The claims in question are tax claims and the liens arising from tax claims must be determined in the Bankruptcy Court. The State, therefore, has a simple remedy to have this matter adjudicated by bringing a petition to marshal liens against this still. It wishes to determine the priority of its claim for forfeiture by reason of this unpaid tax as to the claim of the United States which arises from unpaid taxes. Had that proceeding been brought the Referee would then have jurisdiction to determine whether or not the State actually had the forfeiture it claims, and if so whether or not said forfeiture right was prior to the rights of the United States.

The Appellant apparently wishes to have the right granted it by the Bankruptcy Court to take the question of the forfeiture to the State Courts, and is endeavoring to have the Bankruptcy Court give it that right without giving other parties interested in the still notice of the proceedings in the Bankruptcy Court. The Forfeiture Statute would be invalid if it permitted such proceeding. Adequate notice to persons interested in bankruptcy proceedings is required as a matter of due process. See *People v. Broad* (supra), at page 9 thereof, which reads as follows:

> "But in this jurisdiction the cases have established the rule that to constitute due process the statute must itself provide for notice; and consequently we must hold the portion of the act which purports to authorize forfeitures without notice to the owner to be invalid."

The "owner" in the *People v. Broad* (supra) case was the holder of a conditional sales contract on the automobile which the State was endeavoring to forfeit. The finance company, therefore, was actually only a lien claimant, and the rule would seem to be that all claims of an interest in property to be forfeited must have notice of any proceedings looking thereto.

### (5) THE REFEREE IN BANKRUPTCY HAD THE INJUNCTIVE POWER EXERCISED IN THE PREMISES.

Referees in Bankruptcy have general injunctive powers to protect the assets of bankrupt estates administered in their Courts.

*In re California Pea Products, Inc.* (supra);

*Dayton v. Stanard,* 241 U. S. 588, 36 Sup. Ct. 695;

*Isaacs v. Hobbs Tie & Timber Co.* (supra).

The fact that those enjoined are the State officers charged with enforcing the particular act involved does not remove the Court's power to prevent them from interfering with the bankrupt estate by an unauthorized and unlawful exercise of their alleged powers.

*Fitts v. McGhee,* 172 U. S. 516, 19 Sup. Ct. 269;

*In re Tyler* (supra).

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## B.

### DISCUSSION OF APPELLANTS' ARGUMENT AND CASES CITED THEREIN.

Many of the cases cited by Appellants are apparently cited for the purpose of establishing that the State has the power to supervise the manufacture and sale of intoxicating liquors, and Appellee does not dispute this, but does maintain that the Bankruptcy Court has the sole power in a bankruptcy proceeding to determine the validity, amount and time of payment of any taxes levied by the State under its said powers.

Subdivision (4) of Subdivision (a) of Section 64 of the Bankruptcy Laws of the United States (supra);

*State of New York v. Jersawit,* 263 U. S. 493, 44 Sup. Ct. 167;

*State of California v. Moore,* 88 Fed. (2d) 564;
*In re Brown,* 41 Fed. (2d) 228.

All of their remaining cases cited by Appellants, which have to do with the payment of State taxes by trustees in bankruptcy deal with cases where the trustee is *operating a business,* and thus is required to pay the tax under the provisions of 124(a) of Title 28, *U. S. C. A.* There is no operation of a business here, and those cases cited are completely worthless in determining the issue now before the Court, said cases cited being as follows:

*Boteler v. Ingels,* 100 Fed. (2d) 915 (in which said case the United States Supreme Court has granted certiorari, 307 U. S. 617, 59 Sup. Ct. 792);

*Gillis v. State of California,* 293 U. S. 62, 55 Sup. Ct. 4.

Appellants seems to place considerable reliance on *Texas v. Donaghue,* 302 U. S. 284, 58 Sup. Ct. 192.

That case is not in point here. In that case a trustee took over some oil that was produced in contravention of the Conservation Statutes of Texas. That statute declared the said oil to be contraband at production. In our case the still was a licensed still with a delinquent renewal payment. In the *Texas v. Donaghue* (supra) case, the Court held the Bankruptcy Court had no power to determine whether or not the oil was forfeited, as that was a matter for the State Courts. But in that case they were not dealing with taxes. Here we are dealing with a tax and the

Bankruptcy Laws of the United States specifically vest in the Bankruptcy Courts the sole jurisdiction to determine the validity and amount of taxes claimed against bankruptcy estates, thus removing that power from the State Court.

Subdivision 4 of Subdivision (a) of Section 64 of the Bankruptcy Laws of the United States (supra).

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## V.

### CONCLUSION.

It is unfortunate that the two sovereignties, State and Federal, find themselves at odds in the matter before the Court. The Appellants apparently feel that its supervision is required over the Federal Courts in their administration of bankruptcy estates in order to safeguard the citizens of the State of California from some imaginary evils that might arise from the bankruptcy administration.

The Congress of the United States has seen fit to require trustees in bankruptcy to cooperate with the state, and abide by their regulations when the said trustees are carrying on a business within a state. However, Congress has had sufficient confidence in its Courts to omit the requirement of compliance with state regulatory statutes where the Federal Courts are merely liquidating agencies.

The State of California has not seen fit to impose its regulations specifically on liquidating trustees in

bankruptcy, and the Courts of the State of California have heretofore recognized this exception to such regulatory and taxing statutes. Thus since neither State nor Federal statutes require the payment by the Appellee of the tax claimed by Appellants it is respectfully urged that this unfortunate dispute should be decided in favor of the Federal sovereignty, the Appellee.

Assuming for the moment, but not admitting, the Appellee is liable for this tax, nevertheless, the payment of the tax, if any, is not due, since the tax is only an expense of administration in this bankruptcy proceeding. Naturally no forfeiture can take place for non-payment of a tax that is not due. The still passed to trustee prior to any forfeiture by the State, and the State at that time merely had a claim against the bankruptcy estate for an unpaid tax owing by the bankrupt at the time of his adjudication. The Appellants cannot now, with good grace, cry "forfeiture" after their conduct in conceding no forfeiture when they asked the trustee to pay the tax on this still and to procure a license to possess the same.

The order of the District Court is correct in protecting the bankrupt estate from unlawful interference by Appellants. Appellants should have filed their claim for the tax due by the bankrupt, and at the closing of the estate it would have been paid. Appellants are not entitled to be paid this license tax on the trustee's possession.

I respectfully submit that this Court should hold that the trustee is not subject to the payment of this tax, and that the injunction heretofore issued should be a permanent and final injunction enjoining the Appellants from taking any steps to enforce any said payment from the trustee.

Dated, Fresno, California,
May 29, 1942.

Respectfully submitted,

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*Attorney for Appellee.*